

work out the rational utilitarian form of that and concentrate on it at the level of rules; there's only one big principle and some derivations from it, the principle of utility. I think, that's how I see it, I may be wrong. I'm not a great historian, as you know, especially not of English law.

TT ; Thank you.

McC ; It's my pleasure.

Professor MACCORMICK INTERVIEW 2 : Transcript

TT ; Last time I asked your opinion concerning the second main pillar of your academic work, namely the history of legal thought, particularly the Scottish. Today I would like to ask questions about the third main pillar, namely your political thought, and the relationship among the three main fields of your academic work.

As to your political thought, I think a paper "Nation and Nationalism" which was reprinted in your excellent essay *Legal Right and Social Democracy* is one of the most important papers through which we can understand your political thought. Therefore today first I would like to ask two questions concerning this paper. First topic is literally about the nation and nationalism in Scotland. I think a most important point of this paper is of course the distinction between nation and state. You say that states are legalistic impersonal entities; nations are communities with culture and personality. In this sense Scotland is of course not a state but it is a nation which is "constituted by a relatively large group of people who conceive themselves to have a communal past, ...from which past is derived a common culture which represents a form of cultural continuity uniting past and present." Based on this view concerning the nation in general you trace back the origin of nation and

nationalism in Scotland to the so-called age of War of Independence in the late thirteenth century and early fourteenth century. In this connection, what is the most important and interesting concept for me is the 'community of the realm' of Scotland. I think this concept represents the entity of the Scottish nation which has their own history, tradition, and culture. But what's more, from the point of view of legal philosophy, I think this concept is the upper concept of the 'common law of the land'; namely the 'common law of the land' were historically developed and gradually established through and according to the development of the 'community of the realm' of Scotland. This view is I think exactly the same as for example Adam Smith's theory of legal evolution.

Now my first question is political one, concerning the present situation of Scotland. You point out that 'the present governmental system of the UK is profoundly inimical to the continuing existence of the nations of the Scots and the Welsh, or so it appears'. I think in this statement, the phrase 'the nation of the Scots' can be replaced by the 'community of the realm' of Scotland. If it is so, could you explain a little more in detail the present situation by giving some concrete examples?

Another question is a much more philosophical, and at the same time in a sense legal - historical one. Can I ask you to explain the relationship, which I mentioned before between the 'community of the realm' of Scotland and the 'common law of the realm'? Second topic is concerning the relationship between legal education in Scottish universities and the above-mentioned 'community', and continuity of the 'common law of the land'. In one passage of your faculty's handbook for students, it reads that 'basically legal education in Edinburgh University is based on Scots law'. Can you explain briefly first the general situation of legal education in Scotland, particularly in connection with this provision?

Last topic is concerning the mutual connection among your three main pillars. Tentatively, I divide your whole academic works into three main branches, but of course I think in your

mind each branch has a close connection with each other. Finally could you tell me the mutual relationship among your three main branches?

McC ; Your first question, about a political aspect of my philosophy, asks me about the present condition and situation of Scotland, but as you introduced question you raised the topic of the 'community of the realm' and the 'common law of the realm'. Perhaps I should say a few words in the way of historical preface thereof.

The historical documents of the thirteenth and fourteenth centuries relating to the interaction between the nobility of Scotland and the King of England on the question of the superiority of the English King over Scotland and the conditions for the decision of the succession to the Scottish Crown in 1286 are documents purporting to be issued by the 'community of the realm of Scotland' or by the signatories on behalf of the 'community of the realm of Scotland'. Recent scholarship, particularly by Professor Barrow, makes it clear that that's a fairly technical term of the period. The '*communitas regni*' were the people I think roughly speaking who had some share in the government of the kingdom, and therefore it means as we would think of it nowadays the whole community of the Scots, the whole people, er, it means, I suppose in a modern phrase, the governing class. On the other hand, as George Buchanan pointed out, even three hundred years later, in his book *De Jure Regni apud Scotos*, in a sense the constitutional myth or doctrine which was partly I suppose justified by the social facts was that this governing class was in an important sense representative of the wider community, what we would call a community, what they didn't call a community, the nation as a whole, because of the bonds of family ties between even the feudal aristocracy and the common people. Not universally so, not absolutely so, but I think there was enough of a clan tradition, a clan mythology among the people that there was a sense in which the lowest was represented in the highest.

So that although the '*communitas regni*', the 'community of the realm', is not the whole of the common people of Scotland or anything like it, nevertheless there is some notion of the whole nation being represented via the '*communitas regni*', via the community of the realm. And I think you're right to say that this is very closely linked with the notion of the common law, or anyway what people would probably at that time have called the ancient laws and customs of the Scots, that the rights of the kingdom, the rights of kingship, er, and the right of succession, and the relationship between the king and the great persons, the great tenants-in-chief, the 'community of the realm', were legal relations. And it was clearly envisaged, certainly as early as 1320 by the time of the Declaration of Arbroath the end of the independence struggle, that the king's right is envisaged as being conditional upon the king's duty. The king's duty is to defend laws and customs of the realm, to defend the rights of all the members of the realm, and as long as the king does that he retains the right to kingship, but if the king forfeits that trust, then he forfeits the kingship with it. And that notion of forfeiture, that there's a legal relationship between the king and the kingdom, is I think a very important one, and it came back from time to time in the subsequent history of Scotland in very important ways. Er, it was certainly thought until the sixteenth or seventeenth century that the Scots shared with Scandinavian countries a peculiar position in this, because their kings had never been other than kings under their own law, whereas in many other countries had been king by conquest. When the Norman kings became kings of England they didn't have to acknowledge any legal limit or any legal basis of the relation between them and their subjects, their subjects by conquest. And according to Scottish constitutional historians, or Scottish constitutional theorists of earlier periods—we talked about this last week—the relationship of king to people in Scotland was specially based upon the historic laws and customs, and in these laws and customs the 'community of the realm' has a special place. So I think you're right, the law defines the

community, and the community defines the law. It's an important mutual reflexive relationship. Well, that was the historical preface, and I think another of the questions later comes back to that perhaps.

TT ; Now can I ask just one question ? When, for example, we compare the Declaration of Arbroath with the English Magna Carta in the thirteenth century, I think, referring to your historical explanation in Scotland, I think it has a very different background, because Magna Carta is a protection of nobles' right against the king, but the Declaration of Arbroath is not the protection of just kings or nobles but common ...

McC ; Yes, that's right. The politics of it are of course different. Magna Carta arose out of a conflict between the king and the noble classes in the nobility asserted their right against the king and got him to grant a charter confirming their right, so it's an adversarial document, and it was one which was grasped by a section of the people from the king, but as you say, the upper class of the people. Although some of the things which they grasped like the right of persons to trial by a jury of their peers came to acquire a much more radical far-reaching constitutional significance than perhaps it originally had in the thirteenth century. The Scottish Declaration has a different political context. The political setting is of a whole country asserting its independence from a more powerful neighbour and asserting it to the Pope, I suppose rather as a small country might today write to the Secretary General of the United Nations saying our rights have been violated, one could imagine a government in exile of Afghanistan or one could imagine the Dalai Lama in Tibet or something of the kind writing to the Secretary General of the United Nations saying 'Acknowledge our rights and that they've been violated by our neighbours'. Erm, I suppose you could even nowadays envisage such letters being sent to the Pope, given the present Pope's standing in world politics. But in this case it's essentially a joint exercise of

the court, the king and the nobility, to send this protest. What's interesting is the terms in which they make the protest, which as you say indicate an acknowledgement of the right of the community at large and of the king's duty to defend these rights. And therefore a fairly spirited assertion of the possibility that the king will forfeit his right by failing to defend the rights of the people, which is a very important doctrine.

TT ; But when you say 'people', does it mean not so-called 'common' or the mass, but just the nobility, or upper class ?

McC ; Well the 'community of the realm'... I think it's easy to read. The point I think would be that the 'community of the realm' and the king both stand in special relationship to their own rights and ideally the rights of everybody else. Their position is that of defending the customary rights of the people in Scotland of whatever rank and dignity. Of course that's the ideal, not the actuality, or often not the actuality. Erm, but it remained a live ideal throughout the constitutional and even political literature, right through until the Union. Further is, I think, the last spokesman of a distinctively Scottish vision of constitutional relations. And I think it's fair to say that the modern doctrines of constitutional monarchy in Britain, or in Japan, bear a closer relationship to that old picture, and perhaps derive something from it, albeit rather indirectly and round corners. And I think it had considerable influence on English constitutional theorists like Locke, and they in turn influenced the later understading of the constitution. So it's an idea which was a long time coming, but came in the end.

Now perhaps we ought to look at the political question. You say rightly that I point out that the present governmental system of the UK is 'profoundly inimical to the continuing existence of the nations of the Scots and the Welsh, or so it appears'. Or should I say here the 'community of the realm' of Scotland? Well, yes, it's always attractive to use the old phrases. Of course we would now understand the 'community of the realm'

of Scotland in terms of all those who have a part in the government, that is to say, all the adults under a democratic constitution. So if you imagine the 'community of the realm' as being the people with particular rights to participate in law-making in the thirteenth century, then you can say the 'community of the realm' has grown with the passage of time. And so that would be a good way to put it. But that would be deliberately making an argument about a historical and political evolution.

However now you want me to explain the present situation a little more in detail by giving some concrete examples. Well, for example, we're about to undergo the introduction of a new form of local taxation in Scotland. This so-called 'community charge' is really in effect a poll tax, a tax upon every person living at the same rate except with some diminutions in the level of tax for very poor people. As people would say it's becoming a tax on the right to vote. Anybody who registers for voting will have to pay the tax. Now there are arguments for and against a tax of this kind. You could say that when it's put together with a progressive income tax, the nett effect is a reasonable and progressive system of taxation, overall people contribute overall in accordance with ability to pay, and that's what the government says. And they may have a case, though I disagree with it. But that's not the point. The point is that this has been introduced despite the fact that as far as we know approximately ten per cent of the electorate in Scotland would have voted for it given a choice, and something like twenty-eight per cent of those who actually voted in the last election voted for the party whose policy it is. This is a clear case, then, of the imposition of a quite new and very far-reaching system of local taxation without the consent of the people.

And that is one example of the way in which the present system of government leaves important decisions of merely local effect to be taken outside. There were periods since the Union of 1707 when British government followed, generally speaking, the policy of not legislating for Scotland except in ways which

seemed to have substantial support in Scotland, and when that was done, and when the scope of government was much smaller than it now is, you could say that the Union nevertheless left very substantial internal self-government in Scotland. At any rate the Union didn't involve over-riding Scottish preferences on purely Scottish matters. I think it has changed in the recent past, or changed accumulatively during the twentieth century as government and its affairs have grown. So there is less of a sense of independent action within Scotland.

At the same time, in a perfectly acceptable and understandable way, the whole tendency of the modern world is towards larger and larger units in business, and larger and larger markets, larger and larger involvements, so for example where in the nineteenth century nearly all the industrial enterprises operating in Edinburgh or Glasgow, operating anywhere in Scotland, would probably have had a Scottish base, would have had a Scottish headquarters, would have had Scottish research staff working, so far as research was done then, which was quite a long way in this country, there would have been a great deal of local self-control industrially and commercially. The modern tendency towards bigness in firms and bigness in markets inevitably implies that that sort of local control has in many ways disappeared. In education and universities, the education is very large, it's based on central government, and the room for manoeuvre, the room for independence of action, the room for distinctiveness in style of the Scottish universities less than was.

The whole tendency of modern government has been towards bigness, you might say in simple terms, and my own view is that in these circumstances, unless we have some active reasonably powerful form of representative government in Scotland, we will simply become a northern district of the UK, which in turn will perhaps become an offshore district of the European Community, and I'm personally very strongly in favour of things like the tendency towards political unification at some level of western Europe. I think both in terms of protection and promotion of peace, and in terms of the expansion of trade and

beneficial enhancement of economic activity there's a great to be said for it. I even think that the abolition of the so-called nation state is a good thing. I think that some of the wars of the last two hundred years have arisen out of nationalism in an adverse sense, and that one of the things which we're seeing in Europe is an abolition of the nation state, the sovereign state, in that form which did such damage, as well as promoted so many good things too.

Well, that's all a good thing, but we need to have a counter-balance, we need as well as letting the top grow, letting the general government of Europe grow, we must restore the independence and self-control of the smaller parts. And that wouldn't just mean Scotland of course, but it means Catalonia in Spain, it means the Basque country, it means Corsica, perhaps Brittany in France. It means taking a look at the regions of Europe again, and letting the old nations of Europe where they have been submerged re-emerge, not as nation states in old nineteenth century sense, but as national units within an international enterprise, and I think that's very important. That's my political philosophy.

Now then, your second topic contains the relationship between legal education in Scottish universities and the continuity of the 'common law of the realm'. Well, I ought to have said in the last answer of course that one of the things guaranteed for Scotland at the time of the Union with England was continuation of Scots law and the Scottish courts. I ought to have also said in my last answer that in general terms, and on the whole, the Westminster parliament has played fair, or reasonably fair in acknowledging the distinctiveness of Scottish law and Scottish legal institutions. That's to say, in general they have either left our law the way it has been, or amended it in response to proposals from Scottish committees and commissions which have taken careful advice within Scotland.

But there are other sides to the picture. In the recent past in areas of commercial and financial law, and company law, the Department of Trade and Industry or whatever, has tended

simply to decide what it thinks is the right policy, go ahead with legislating, and then adapt a little to the interests of Scotland rather than look at the historic Scottish solution and see there was anything to be learned from it as well as from the English solution.

Again, however, if you have a legal system which wishes to, needs to keep itself adequately modern and adapted, it has to have a legislature which does it. The more we live in a time of change, the more necessary it is to have a political legislature which can adjust Scots law to the needs of the times. Now we have a choice. We can go on using the United Kingdom parliament for this purpose, but that will result in a steady assimilation of Scots law into a kind of amalgam of British law, UK law, English law it will really be, and that will be the end of that. But if we want to see a continuing vital Scottish identity, the law is important to it, we need a legislature for that. So that's as it were almost a continuation of the last answer. Erm, but you would now want me to go on and talk about this in the context of legal education, which, as you say, in Edinburgh University is based on Scots law.

Well, the Scottish universities which teach law, the five of them involved, like all universities teaching law anywhere, have as their primary responsibility instruction in law as it applies in the relevant jurisdiction. A Japanese university teaches Japanese law, a Korean university teaches Korean law, er, an English university teaches English law, a French university teaches French law, and a Scottish university teaches Scots law. It is however important to remark that the subject in question is law, and I think that there is something universal about that. There is law in various manifestations, Japanese, Korean, Scottish, English, French, whatever. It's right that universities instruct people particularly in the law of this jurisdiction and help people to become qualified to practise in this jurisdiction. But they have to do it against a background awareness of the universality in modern human societies of legal institutions, and I think one of the features of a small country with a legal

system like the Scottish one is that we are perhaps more aware of the importance of the comparative aspect, seeing our law in connection with, and in relation to, and in contradistinction from, other laws.

I spoke of a legal system 'like our one'. As you know, the Scottish legal system by inheritance owes much to the Roman and Canon laws as these evolved in Europe, to the feudal law as an European phenomenon, adapted by us particularly through England. And then it owes independently other things more or less directly to English law. For example, the modern public law, a lot of the modern statute law, and something of our general approach to legal thinking, has been greatly influenced by English thought, especially in the last two hundred years. There is of course, apart from these two derivations, a certain amount which you might put down to native genius, or something of the kind. The writers and judges of whom we spoke last week like Lord Stair or Lord Inglis, Lord Cooper, who in their particular way have helped to develop our law as a distinctive and by no means poor variety of the genus law. So, our legal system is one which makes us very aware of the comparative dimension. It mingles various things, and is our own local synthesis of various antitheses. It's right that that should be a part of our concern in teaching of law. It's not the only thing that we teach.

You asked me as your second question, and I'm afraid I've put it in third, to talk about a philosophical question and a historical one, explaining the mutual connection between the 'community of the realm' of Scotland and the 'common law of the realm'. Well, in my preface to answering your questions I said quite a lot about the 'community of the realm' and the way it connects with the 'common law of the realm'. I think you can still say that, a large part of the sense in which there is a political and social identity in Scotland connects with the existence, the continued existence of a body of distinctively our law, so the 'community of the realm' in its modern sense still owes quite a deal to the existence of a common law. On the

other side, to focus on the word 'philosophical' in that question, I think that legal education in Scotland, although it is much concerned, and rightly concerned, with simply the contemporary continuing law as it is here, is also distinctively comparative - we've mentioned that - historical, a quite considerable attention is paid in all our courses to the history of law, and the history of legal ideas as something which is essential to a contemporary understanding of things, and indeed to an understanding of social phenomena as social phenomena. And I think we also have a quite strongly philosophical approach, perhaps I should say theoretical; people here tend to think of the law not just as a body of black letter rules, but think of it in terms of some underlying philosophy or theory, some sociological connections, so that our approach to legal education, though it's local, is also, as I would say, comparative and historical and, putting it widely, theoretical. And I think that's an important aspect of our approach to legal education, especially in Edinburgh. Sorry, you were going to ask another point.

TT; Yes, just a very simple question. Did the policy of teaching the Scots law in Scottish universities begin at the Union of 1707, and continue to be the same style at present?

McC; Well, actually some of the beginning of modern law teaching do go back to 1707. I'm the Regius Professor of Public Law and the Law of Nations in Edinburgh, and that chair was first established in 1707. But that very description of the subject indicates very much an eighteenth century approach to the idea of legal education. Public law and the law of nature and nations. This was a chair founded on that set of assumptions about natural law which characterized the seventeenth and eighteenth centuries, er, that as I said earlier, law is a universal human phenomenon which has its local manifestations in particular systems of positive law. They would have said a universal and in a strong sense rational human phenomenon. I'm as you know a little weaker on that point of rational. But I don't want to

begin with, it still wasn't fixed and certain that the main emphasis was going to be on Scots law. However, during the eighteenth century the chair of Civil Law and the chair of Scots Law were also founded, I think about 1714, isn't it, but maybe 1713, I can't remember the dates exactly now. And especially with the chair of Scots Law, the task of the professor was to teach the local legal system. And this produces people like John Erskine and George Bell, whose work as professors contributes greatly to the literature of the law. And although these are the two most distinguished early holders of the chair, there have been other people of great distinction like Sir Thomas Smith, Candlish Henderson, John Schank-More, and other people like that, all of whom made distinctive contributions through their tenure of the chair.

As a matter of fact, it wasn't until the nineteenth century that the main place for the training of Scottish lawyers came to be the Scottish universities. During the eighteenth century the advocates in particular would commonly spend at least a part of their education in Netherlands, studying Roman-Dutch law in the great law schools of Leyden and Utrecht. And most Scots lawyers of the eighteenth century would have had a fair part of their training there. Er, certainly those senior lawyers who eventually became judges. That reinforces the point I was making earlier about the comparative nature of legal study in Scotland. For a long time, we were much influenced from Europe, as well as from England, and that explains the historic present character of Scots law.

So that was an intervening question. The last topic that you wanted me to confront today concerns the mutual connection among the three main pillars as you call them of my work. You would say I think that part of my work is within analytical philosophy in a wide sense, part of it is the history of ideas, in particular the history of the Scottish Enlightenment and related Germanic thought of the nineteenth century, and part of it is contemporary political philosophy, problems about justice and nations and nationalism and the disestablishment of morals and

other suchlike questions which I cover in the book *Legal Right and Social Democracy*. Well, is there a connection between these three things? Yes.

TT; Can I first say, your whole academic work is concerned closely with Scottish traditional moral philosophy? Or can I say...

McC; Yes, I suppose that's the second history of ideas part. The tradition of moral philosophy in Scotland, yes, or is that a fourth...

TT; Yes, but can I say that your work as a whole is moral philosophy, or...?

McC; Ah, yes.

TT; Or particularly traditional Scottish moral philosophy. Can I say that?

McC; Yes, I'm sure you're right. I am rather strongly of the view, which is expressed in various parts of my writings that there are many kinds of things which one cannot do without some conscious self-location in a tradition. People don't get to be great philosophers, even good ones, even competent ones, simply by sitting and inventing it all for themselves. Er, you can do work of this kind only by setting yourself within and against a tradition. Of course in philosophy, the traditions are more important, the traditions of ideas, than local traditions, that it's interesting philosophy matters more than that it's Scottish or German or French or Japanese philosophy, so I don't want to press too hard the Scottish aspect, although I'm very conscious of the intellectual descent to which I belong, including people like Ferguson, Fletcher, Hume, Smith, MacMurray, MacLagan, and so on.

And I've never wanted to deny that I take some pleasure in it. But I think that the importance of the thing is to get

the answers to philosophical questions correct. And secondly, for that reason, although one has to locate oneself within a tradition, the task is not just to repeat it or replicate it, but to carry it forward, ask new questions, to answer, and to correct, to advance, to change, adapt. For that purpose one thing which is important is to form a sound view of what the history has been about. Re-read the great texts, don't try to invent it yourself but go back to Hume and Smith, and see what you have to find else in Kant and Hegel. Until you've got a reasonably clear picture of the history of the ideas, you don't have a proper contemporary understanding of them. Unlike some of my colleagues, particularly people like Skinner in Cambridge, I have never myself seen getting the history clear as end in itself. I think it's very important, very worthwhile, but for me philosophy is about how the world is, and about how we ought to live in it, so that even more than just understanding what Hume or Smith or whoever had to say, I want to ask myself, well, what's the right answer to that question. So that one reason for studying the past is to think better about the present.

To me, there are two important ways of thinking about the present. One is the analytical, as used to call it, analysing concepts and ideas, analysing the style of legal reasoning, and all these other legal concepts that we try to work with. It has ceased to be fashionable, and perhaps was never correct, just to call that analytical and analysing. I think that developments for example recently by Ronald Dworkin but also by many other people, and I think to some extent myself, er, have contributed to the idea that it's not just analysing but interpreting. What we're trying to do is to use philosophical ideas, philosophical schemes of understanding, to interpret the social world, interpret the legal world, interpret styles of reasoning, uses of concepts, er, and this kind of thing. So I would by rights I suppose want to call this an interpretive analysis.

Why it's worth calling it analytical or descriptive is because I still am of the view that there are two jobs, one is the broadly descriptive, and the other is the prescriptive. Where I

strongly want to argue about how the world should be, where I'm putting forward a normative, not just a descriptive theory, and I suppose in my own writing, *Legal Right and Social Democracy* is the attempt to use the resources of analytical interpretation to develop theories of how the world should be. Whereas in *Legal Reasoning and Legal Theory*, a lot of the other work on legal reasoning, I'm more concerned with trying to understand in a word how the world is, how legal order works, how we're best to understand it, even if it's not exactly as we would ideally wish it to be.

So I think this business of the difference between the descriptive interpretation and the interpretive prescription, the interpretive normative work, is an important one, and I would like there to continue to therefore be three parts to my work, roughly speaking. Some of it will be mainly historical, some of it will be mainly analytical-descriptive-interpretive, and the other bit will be normative and political. And I think one should try to have fairly clear methodological differences between these different lines of approach, although they all in important ways shade into each other as well. But that's how I account for it, and I'm very grateful for your analysis of my work as having these three parts. I agree it, although I don't think I had seen them as clearly until you asked the question. Thank you.

TT ; Thank you. Thank you so much for giving me a good chance to ask various questions. And at the same time I have to say thank you for giving me a good opportunity to research here Edinburgh. And thanks to you I have been able to make good use of and enjoy my researching time in Edinburgh University. Based on the results of my researching here, after going back to Japan I shall publish some monographs on Scottish legal thought. And some time, as the near future as possible, I hope I can invite you to a Japanese university as a visiting professor. Thank you very much.

McC; Thank you very much. And I hope you will say to colleagues in Japan that we're very much appreciated your visit here, and that we hope that other Japanese scholars will from time to time favour Edinburgh with a visit.